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No.

In the

**Supreme Court of the
United States**

OCTOBER TERM 1983

DON HALSELL,

Petitioner,

v.

LOCAL UNION NO. 5, BRICKLAYERS
& ALLIED CRAFTSMEN; TEXAS STATE
CONFERENCE OF THE BRICKLAYERS &
ALLIED CRAFTSMEN; INTERNATIONAL
UNION OF BRICKLAYERS & ALLIED
CRAFTSMEN,

Respondents.

*Petition for Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit*

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and

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QUESTION PRESENTED

Whether a union member is entitled, under section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, to "constitutionally reasonable" prior notice of the conduct that may subject the member to fine or expulsion by the union.

LIST OF PARTIES

1. DON HALSELL
2. LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN
3. TEXAS STATE CONFERENCE, BRICKLAYERS & ALLIED CRAFTSMEN
4. INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 706 F.2d 313 (5th Cir. 1983). The opinion of the District Court is reported at 530 F. Supp. 803 (N.D. Tex. 1982).

JURISDICTION

The opinion of the Court of Appeals was issued on May 5, 1983. The Court denied Halsell's Petition for Panel Rehearing on June 1, 1983. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("the Act"): "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

STATEMENT OF THE CASE

Halsell, at the time a member for more than twenty-five years of the Bricklayers & Allied Craftsmen ("BAC"), was asked in the summer of 1977 to teach a bricklaying class for duly indentured bricklaying apprentices at Skyline High School in Dallas, Texas. The job was to be a temporary one, lasting only until a fulltime instructor could be engaged. Funding for the class came in part from the sponsor of the class, an association of nonunion masonry contractors, in part from the Dallas Independent School District and the federal government, and in part from the apprentices themselves. Shortly after he began teaching the class, Halsell was charged by the Dallas local of the BAC with violation of the International Constitution, Code 5, paragraph 1(s), which states:

It shall be an offense against the International Union . . . for any member . . . to commit any act which is

seriously detrimental to the interests of the International.

Trial of the charge before a union tribunal resulted in imposition of a \$250.00 fine. Halsell appealed the fine without success to the Texas State Conference of the BAC and to the International, then filed suit in the District Court under 29 U.S.C. § 412. Among other things, he contended that the fine violated § 101(a)(5) of the Act because he did not have reasonable *prior* notice that his conduct — teaching a bricklaying class — could subject him to union discipline. The District Court declined to consider whether Halsell had received such notice because it read this Court's decision in *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), to hold that the Act does not entitle union members to prior notice of conduct for which they may be fined or expelled. 530 F. Supp. at 807; *supra* at A-8. The Court of Appeals summarily affirmed, citing *Hardeman*. 706 F.2d 313; *supra* at A-1.

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS OF THE LOWER COURTS MISCONSTRUE THIS COURT'S *HARDEMAN* DECISION SO AS TO DENY UNION MEMBERS A FUNDAMENTAL DUE PROCESS RIGHT GUARANTEED THEM BY THE "UNION MEMBERS' BILL OF RIGHTS," SECTION 101(a) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 29 U.S.C. § 411(a)—*PRIOR* NOTICE OF CONDUCT FOR WHICH THE MEMBER MAY BE FINED OR EXPELLED BY THE UNION.

This Court, in the course of deciding *Boilermakers v. Hardeman*, *supra*, made these two statements:

1. "[A] union may discipline its members for offenses not proscribed by written rules at all . . . [so] it is surely a futile exercise for a court to

construe the written rules in order to determine whether particular conduct falls within or without their scope." 401 U.S. at 244-45.

2. "[T]he notice [of the charges against Hardeman] appears to have contained a detailed statement of the facts relating to the fight that formed the basis for the disciplinary action. Section 101(a)(5) requires no more." 401 U.S. at 245 (footnote omitted).

The District Court and the Court of Appeals construed the quoted statements as a holding that the Act does not grant union members *any* right to *prior* notice of the behavior for which they may be fined or expelled. That construction could only be arrived at, however, by disregarding both the full legislative history of the Act and the facts and actual holding of *Hardeman*.

1. *The Act.* *Hardeman* discusses some pertinent history of the Act. It notes that the present language of section 101(a)(5) was substituted for a requirement that union discipline be based only on "breach of a published written rule . . ." and that the change was intended to create a standard of "constitutionally reasonable notice. . . ." 401 U.S. at 243-44. There is, however, in the legislative history not the slightest suggestion that Congress intended the "constitutionally reasonable notice" standard to exclude a requirement of fair *prior* notice of prohibited conduct. Such prior notice had been recognized as an integral part of constitutional due process long before 1959. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). Moreover, a principal purpose of the Act was precisely to prevent the improper use of vague union disciplinary rules. Senator McClellan explained:

I wish Senators to listen to what a member of some unions can be expelled for or punished for. How would Senators like to be tried under such a general policy as I am about to read . . . 'Good standing in a union can

be lost for a variety of reasons so broad or vague and uncertain as to be subject to abuse and discriminatory application.' . . . [U]nder some union constitutions a union has the power to suspend or expel a member on such grounds as 'engaging in conduct unbecoming a union member.' What does that mean?

105 Cong. Rec. 6477-78 (1959); II LEGISLATIVE HISTORY OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 1104. It is for that reason alone highly improbable that the compromise by which "constitutionally reasonable notice" replaced the requirement of discipline only for violation of a "published written rule" was intended to legitimize discipline without reasonable *prior* warning of what constituted punishable behavior.

There is, moreover, a much simpler, and more accurate, explanation of the compromise. The examples of union member misconduct used by opponents of the original bill—murder, rape, embezzlement, and bribery, 105 Cong. Rec. 6491, A3293-4 (1959) — are all serious violations of criminal law. In other contexts, such as public employment, criminal conduct has often been analyzed, for due process "fair notice" purposes, as "carry[ing] with it its own warning. . . ." *Shawgo v. Spradlin*, 701 F.2d 470, 478 (5th Cir. 1983); *Parker v. Levy*, 417 U.S. 733, 757 (1974) ("no reasonable doubt" that publicly encouraging enlisted men not to go to Vietnam would subject plaintiff to military discipline; vagueness challenge to "catchall" prohibition rejected); Note, *Constitutional Law—Vagueness Doctrine — Police Departmental Regulation Proscribing "Conduct Unbecoming an Officer" is Void for Vagueness*, 53 TEXAS L. REV. 1298, 1305 & n.43 (1975) ("hardcore" misconduct viewed as precluding vagueness challenge). Cf. *Smith v. Goguen*, 415 U.S. 566, 578 (1974) ("hardcore violator concept" may preclude vagueness challenge where statute applies "without question to certain activities.>"). With the amendment to the Act Con-

gress obviously intended to permit unions to discipline their members without a "published written rule" if the conduct was "hardcore" and so "carried with it its own warning." Senator Goldwater, as quoted in *Hardeman*, was thus technically correct that section 101(a)(5) does not *require* that *all* disciplinary charges "be based on activity that the union had proscribed prior to the union member having engaged in such activity." 401 U.S. at 244.

It is vital to remember, though, that at the time Senator Goldwater made the statement quoted in the text he was attempting to persuade a House Committee to *reject* the Senate bill containing section 101(a)(5). *Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., pt. 4, p. 1593 (1959) ("The present bill, in my opinion, cannot and will not achieve what it promises. This afternoon, in brief form, I shall discuss the bill pointing out some of its more serious defects.") Goldwater *alone* voted *against* the Senate bill. Thus, it cannot be accepted that the Senator's after-the-fact comment was a fair characterization of the pre-passage understanding of the Senate as a whole, rather than a deliberate overstatement for polemical effect.

[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.

NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964).¹ In contrast, Senator McClellan, a *supporter* of the bill, who this Court in *Hardeman* stated testified before the Committee "to the same effect" as Senator Goldwater,

¹ *Accord, Holtzman v. Schlesinger*, 414 U.S. 1304, 1312-13 n.13 (1974) (per Marshall, Circuit Justice) ("well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

401 U.S. at 244, in fact made no statement whatever about the prior notice issue at the pages cited in *Hardeman* or elsewhere, except to reemphasize the "usual reasonable constitutional basis" language of Senator Kuchel. *Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., pt. 5, pp. 2235-36, 2251, 2285 (1959).

The understandings of the two Senators are reconcilable. "Hardcore" misconduct — murder, rape, bribery, embezzlement, and their equivalents — could be, under the amendment to the Act, as it always had been, punished consistently with "constitutionally reasonable notice" without a "published written rule" forbidding it. Senator Goldwater, the advocate in opposition, understandably did not emphasize the constitutional limits of the ability to discipline without prior warning; he wanted a stronger bill. Senator McClellan, on the other hand, a supporter of the Senate bill, emphasized the *full* standard: "constitutionally reasonable" discipline.

Petitioner urges the Court to consider the legislative history of the Act. Nothing in that history, including the excerpts cited in *Hardeman*, is inconsistent with requiring unions to discipline members on a "constitutionally reasonable basis" — i.e. with fair prior notice of the behavior for which they may be fined or expelled, either from a reasonably clear written rule or because their conduct "carries its own warning."²

² The arguments of the unions to the contrary notwithstanding, the idea of prior notice of prohibited conduct in union disciplinary proceedings is hardly antithetical to national labor policy. In *Booster Lodge No. 405, IAM v. NLRB*, 412 U.S. 84 (1973), this Court held that a union could not validly fine a member who resigned from the union during a strike in the absence of fair advance warning that such conduct was punishable. *Id.* at 89. In *NLRB v. Merrit Graham Lodge No. 1871, IAM*, 575 F.2d 54 (2d Cir. 1978), the Court, following *Booster Lodge*, rejected the union's arguments, first, that "any reasonable union member would know that the act of resigning during a strike would injure the union

2. *Hardeman*. The painful irony in the holdings of the lower courts that *Hardeman* precludes a lack-of-prior-notice challenge to union discipline stems from two facts: (i) the conduct disciplined in *Hardeman* — assault and battery of a union official, 401 U.S. at 236 — was "hard-core" by anyone's standard, and (ii) the union had a specific "published written rule" forbidding such conduct. 401 U.S. at 236 & n.4. In short, a *prior* notice issue was simply not present in *Hardeman*.

It is telling that the author of a recent, tightly-reasoned article advocating the application of facial vagueness and overbreadth analysis to union disciplinary rules did not find it necessary even to cite *Hardeman*. Note, *Facial Adjudication of Disciplinary Provisions in Union Constitutions*, 91 YALE L.J. 144 (1981). Another respected commentator on the rights of union members noted, and deplored, "*Hardeman*'s overly generous attitude toward vague or even unwritten union rules" without suggesting in the least that the decision stood as a barrier to the development of "a mechanism to ensure that only willing and informed members subject themselves to the possibility of union discipline." Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1030, 1052 (1976). The only conclusion drawn by this Court in *Hardeman* concerning the legislative history was that:

We think this is sufficient to indicate that § 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members.

401 U.S. at 244 (emphasis added). What conduct a union may punish, and the procedural limitations the union must respect in imposing such punishment, are questions

and would call for sanctions," *id.* at 55, and second, that a provision of the union's constitution prohibiting "other conduct unbecoming a member" gave adequate notice. *Id.* The Court found the constitutional provision "too vague" to support a disciplinary fine. *Id.*

logically and legally distinct. See *Facial Adjudication*, 91 YALE L.J. at 162-63 & nn.93, 94.

Some of the legislative history cited in *Hardeman* offers a starting point for analysis of the due process issue raised by Petitioner, but it cannot be asserted on a principled basis that the *holding* in *Hardeman* addressed, much less decided, that issue.

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF TWO OTHER COURTS OF APPEALS

Two post-*Hardeman* decisions of Courts of Appeals conclude that a union member is entitled, under section 101(a)(5) of the Act, to constitutionally reasonable prior notice of the conduct for which he may be expelled or fined. *Semancik v. United Mine Wrkrs*, 466 F.2d 144, 157 (3d Cir. 1972); *Perry v. Milk Drivers' and Dairy Employees' Union, Local 302*, 656 F.2d 536, 539 (9th Cir. 1981). Neither *Semancik* nor *Perry* can be explained as decisions that simply overlook *Hardeman*. The pertinent reasoning of *Semancik* is based heavily on *Hardeman* and *Perry* cites *Hardeman* immediately before citing *Semancik*.

The decision of the Court of Appeals here, affirming the District Court's refusal to consider whether Halsell received reasonable prior notice that teaching a bricklaying class could result in a union fine, thus conflicts with the holdings of *Semancik* and *Perry*, although it probably represents the majority view in its misreading of *Hardeman*.¹

¹ See e.g., *Kuebler v. Cleveland Lithographers & Photo. Union*, 473 F.2d 359, 363-64 (6th Cir. 1973); *Strom v. National Ass'n of Basketball Referees*, 564 F. Supp. 250, 253-54 & n.7 (E.D. Pa. 1983); C. SUMMERS & R. RABIN, *THE RIGHTS OF UNION MEMBERS* 37-38 (1979). See also T. KEELINE, *NLRB AND JUDICIAL CONTROL OF UNION DISCIPLINE* 58-59 (1976) (recommending that if the Court's statement in *Hardeman* constitutes a holding that Congress did not intend union members to have fair prior warning of prohibited conduct, "abandonment of this concept by Congress and the Court is desirable.")

III.

CONCLUSION

Congress guaranteed to union members "constitutionally reasonable notice" in union disciplinary proceedings. Senator Kuchel specifically noted, in defending the bill against criticisms like Senator Goldwater's, that:

We believe that the U.S. district court will be able to determine whether the rights of the union member have been protected and whether he has had constitutionally reasonable notice and a reasonable hearing, and whether the matter has been reasonably disposed of.

105 Cong.Rec. 6023-25 (1959). Abuses of union disciplinary procedures are epidemic, and most are perpetrated under the cover of catch-all rules like Code 5, section 1(s) of the BAC's Constitution. *Facial Adjudication*, 91 YALE L.J. at 148-149 & nn.24-32; *id.* at 166 ("a provision such as that prohibiting actions 'contrary or detrimental to' the interests of the union is particularly problematic. . ."); T. KEELINE, *supra*, at 88 & n.12. It is, moreover, not the corrupt union vice-president or the union president convicted of bribery that feels the weight of these provisions: discipline is reserved for the rank-and-file dissident, the reformer, the independent member willing and able to stand up to union officialdom. Don Halsell may not be a "typical" union member, but the typical member, as reflected by the relative scarcity of precedent under the Act, is usually too intimidated to protect his rights. See *Facial Adjudication*, 91 YALE L.J. at 159 & nn.77-78. Such timidity is well-founded, because courts unwilling to look further than the surface emanations of *Hardeman* make it possible for unions to discipline members not just for *whatever* they please but also *however* they please. Local 5 could have made matters easier for itself here by simply charging Halsell with, and fining him for, being named Don Halsell: under the view adopted by

the lower courts the charge itself constitutes both "constitutionally reasonable notice" and a final and binding determination that such a name is "seriously detrimental to the interests of the International."

Neither *Hardeman* nor national labor policy requires that union members be subject to fine or expulsion at the unrestrained whim of union officialdom. Obviously a potent weapon to enforce conformity, "catch-all" disciplinary provisions most often are the means of fining or expelling members, as with Halsell, not for actions the union could not reasonably anticipate in drafting its rules of conduct or for criminal conduct that "carries its own warning," but rather for completely legitimate activities that the union dares not explicitly prohibit. The Court should make clear that its decision in *Hardeman* did not construe the Act to permit this abuse of a union's disciplinary powers.

For the reasons set forth in this petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals. Without hearing oral argument, this Court should reverse and remand the case to the Court of Appeals for a decision as to whether Halsell received "constitutionally reasonable" *prior* notice that teaching a bricklaying class could result in a union fine. Alternatively, the writ should be granted and the matter set for oral argument in the regular course.

Respectfully submitted

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1. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5, BRICKLAYERS &
ALLIED CRAFTSMEN; TEXAS STATE
CONFERENCE OF THE BRICKLAYERS &
ALLIED CRAFTSMEN; INTERNATIONAL
UNION OF BRICKLAYERS & ALLIED
CRAFTSMEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(May 5, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ,
Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21. United Steelworkers of America v. Sadlowski, U.S. , 102 S.Ct. 2339 (1982); International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman, 401 U.S. 233 (1971).

2. Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON HALSELL

VS.

LOCAL UNION NO. 5, BRICKLAYERS
& ALLIED CRAFTSMEN; TEXAS
STATE CONFERENCE OF THE BRICK-
LAYERS & ALLIED CRAFTSMEN, and
INTERNATIONAL UNION OF BRICK-
LAYERS & ALLIED CRAFTSMEN

CA3-79-0927-C

OPINION

Plaintiff seeks to protect rights afforded by our federal labor laws, specifically those contained in 29 U.S.C. § 411(a)(1), (2), (4) & (5).¹ Jurisdiction in this Court is founded upon 29 U.S.C. §§ 185(c) and 412.²

¹ 29 U.S.C. § 411(a)(1), (2), (4) & (5) read:

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws. [cont.]

² 29 U.S.C. § 185(c) reads:

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Plaintiff is a member in good standing of Local Union No. 6, Bricklayers & Allied Craftsmen. Local 6's parent organizations are Defendants Texas Conference and International.

Though a union bricklayer, Plaintiff has not made his living by laying bricks for about 20 years. He is a brick contractor and Chief Executive Officer of the Brick Institute of Texas.

[cont.] (2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(4) Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Apparently, Plaintiff hires only union bricklayers so he has not had difficulties because he is a brick contractor.

But his position as the head of the Brick Institute of Texas has created problems. The Brick Institute is a trade organization of brick manufacturers. It, of course, wishes to promote the sale and use of brick construction in the State of Texas, regardless of whether the layers are union or non-union.

In August, 1969, Plaintiff, who was then employed by the Brick Institute, got into a dispute with Bricklayers Union Local No. 9 in Waco, Texas, over the training of non-union bricklayer apprentices. This dispute was ultimately settled by the parties while suit was pending in Federal District Court in Waco.

This incident is important presently only because it goes to show that Plaintiff because of his position with the Brick Institute has had differences with his fellow union members for many years.

In the fall of 1977, Plaintiff was approached to help find a teacher for an apprenticeship class at Skyline High School, Dallas, Texas. Plaintiff agreed to help find a teacher and also agreed to fill in as the teacher (for pay) until a permanent instructor could be found. This apprenticeship class was sponsored by an association of open shop contractors.

On November 3, 1977, Mr. William R. Shrum, Business Manager of Defendant Local 5, observed Plaintiff at Skyline High School where he was teaching the open shop class. Mr. Shrum subsequently charged Plaintiff with a violation of Code 5, Code of International Offenses, Paragraph 1(s) of the Constitution of Defendant International. Code 5(1)(s) provides:

(1) It shall be an offense against the International Union:

. . . (s) For any member or affiliate to commit any act which is seriously detrimental to the interests of the International.

A trial was subsequently held on November 30, 1977, by Defendant Local No. 5. Just what happened at that trial is subject to dispute but is clear that Plaintiff admitted that he was teaching the open shop apprenticeship class on November 3, 1977. He was found guilty and fined \$250. A tape recording of that trial was made but that tape was subsequently erased.

Plaintiff was formally notified of the guilty decision and the fine of \$250 in a letter from Mr. Shrum dated December 1, 1977. Plaintiff then paid his fine under protest by a check dated December 15, 1977.

On December 23, 1977, Plaintiff sent a letter to Mr. Y. C. O'Glee, President of Defendant State Conference, that stated that the appeal procedures were not clear to him and asking for guidance. He received his answer in a letter from Mr. O'Glee, dated January 9, 1978, to the financial secretary of Bricklayers Local 6 which was also sent to Plaintiff. That letter informed Plaintiff that he had to pay his fine under protest and appeal within 30 days from his trial date. Though Plaintiff was past the 30-day mark, both Defendant State Conference and Defendant International accepted his appeals, in turn. It goes without saying since this suit was filed that his appeals were denied.

As no appeal had been received within the 30-day period, Mr. Shrum had erased the tape before the appeal was filed. Defendant Local 5 has maintained throughout that Plaintiff never exhausted his union remedies because of his late appeal. This might have been a viable argument had not the other Defendants heard the appeals.

Plaintiff complains that his rights under 29 U.S.C. § 411(a)(5)(C) have been violated because he was not

provided a transcript of his trial. Though it would be best if a transcript were available, there has been no showing of any fault on the part of any Defendant for the failure of Plaintiff to receive a transcript. If anything, the unavailability of a transcript was caused by Plaintiff's confusion as to appeal procedures which are set out in Code 6 of the Constitution of Defendant International.³

Plaintiff contends that that hearing was not "a full and fair hearing" as required by 29 U.S.C. § 411(a)(5)(C). There were substantial differences in the accounts of the Defendant Local 5 trial between Plaintiff and the witnesses presented by the Plaintiff [sic]. One of the chief complaints of Plaintiff is that Mr. Shrum was present at the trial. But Code 6(2)(f)(i) of Defendant International requires the presence of the charging party at a subsequent trial.

Plaintiff's real complaint about the conduct of the trial is the same complaint under 29 U.S.C. § 411(a)(5)(A) that he has about the written charge upon which he was tried and his complaint under 29 U.S.C. § 411(a)(2) that his Right of Free Speech has been violated by the Defendants.

Plaintiff has the view (which coincides with the Brick Institute's view) that anyone who shows an interest in bricklaying should be allowed to become a fully trained journeyman bricklayer. This, to say the least, is not the view of his co-unionists. As would seem natural, they believe that the number of bricklayers be limited to ensure full employment for the present bricklayers, whom they prefer to be union bricklayers. With this in mind, the

³ Code 6(3)(C)(i) provides:

A charged or charging party wishing to appeal must file a notice of appeal by registered or certified mail within 30 days from a trial body's or appellate body's written notice of decision. A copy of the notice of appeal shall be sent by registered or certified mail to the opposing party.

position of Defendants has been and is that there should only be one apprentice for each three journeymen bricklayers. As a corollary of this, Defendants position is that apprenticeship programs should be run under the union's apprenticeship program so that the graduates will be (1) limited in number and (2) union members.

The testimony of Defendants' witnesses was that union members are not allowed to teach apprenticeship classes that are not sanctioned by the union. Plaintiff disputed this by way of the example of a union member who was teaching a non-union sanctioned bricklaying class in a public high school. Defendants witnesses rebutted that this was not an apprenticeship class which qualified a person to be a bricklayer. This testimony was not substantially rebutted. So Plaintiff's equal rights challenge under 29 U.S.C. § 411(a)(1) must fail.

There was no testimony at the trial before this Court to the effect that this equal rights defense was presented by Plaintiff at Defendant Local 5's trial.

Apparently, when Plaintiff showed up for the union trial, he readily admitted that he had taught the apprenticeship class on November 3, 1977, that was sponsored by an association of open shop contractors and not by the union. There were vast differences in the testimony before the Court as to what then happened at the union trial. But all witnesses were in agreement that no further testimony was taken.

Now, we have come down to the rub in this case. Plaintiff contends that the written charge filed by Mr. Shrum should have spelled out just how his conduct was "seriously detrimental to the interests of the International," and that testimony should have been presented at his union trial which would show the serious detriment to the union. He also contends that this provision of Defendant Union's Constitution is vague and overbroad.

As the Fifth Circuit pointed out in *Davis v. Williams*, 617 F.2d 1100, 1103 (1980), cert. den. 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 160, vagueness is a due process consideration and overbreadth is a first amendment ground consideration and they do overlap. In *Davis*, the Fifth Circuit found that a review of provisions such as "seriously detrimental to the interests of the International, supra," entails "meticulous analysis and balancing" which that Court preferred to leave to the Supreme Court.⁴

The Supreme Court spoke as to these matters quite clearly in *Boilermakers v. Hardeman*, 401 U.S. 233, 91 S.Ct. 609, 28 L.Ed.2d 10. The Court said that it was up to the unions, not the Courts, to define the conduct which would lead to disciplinary conduct. In *Hardeman*, the Court approved a charge that specified the provision with which Mr. Hardeman was charged and a statement of the facts of the incident that led to the charge upon which Mr. Hardeman was tried. The Court found that this was all that 29 U.S.C. § 411(a)(5) requires.

Mr. Shrum's charge both recited the provision of Defendant International's Constitution which Shrum was charging Plaintiff had violated and the facts of the incident involved. So the charge was in accord with Federal law.

That leaves us with the question of what testimony had to be presented at Plaintiff's trial for a finding of guilt to be proper. Plaintiff maintains that explicit evidence that would tend to show that his teaching of an open shop apprenticeship class was "seriously detrimental" to the interests of Defendant International. Defendants demur. Here we are back to Plaintiff's long standing dispute with his co-unionists.

It is apparent from reading the Supreme Court's opinion in *Hardeman*, supra, that no evidence was presented at

⁴ Supra, p. 1104.

Mr. Hardeman's union trial other than testimony concerning the facts and circumstances of the incident involved. This would seem to be true in the usual case and ordinarily end our inquiry.

In the present case, Plaintiff has raised a free speech claim under 29 U.S.C. § 411(a)(2). His claim is, essentially, that the charge trial and \$250 fine have been used in an attempt to silence what he considers to be his opposition to the viewpoint espoused by the part of his union that is in control of the union offices. The Court will not, on the whole, get into this squabble. Plaintiff does not claim that any officer of any local, Defendant Conference or Defendant International was not duly elected. So the only assumption that can be made is that the officers speak for the membership.

Plaintiff's contention is not so much that he did not know that the Defendants would look upon his teaching an open shop apprenticeship class with such disfavor as it is that he disagrees with their position and has the right to espouse his disagreement.

Undoubtedly, he has a right to voice his opinions either verbally, in writing or through symbolic acts.

The Fifth Circuit has held that the free speech rights of union members may be limited in three ways. Those three are:

- (1) Reasonable rules pertaining to conduct of meetings;
- (2) reasonable rules as to the responsibility of every member toward the union as an institution;
- and (3) reasonable rules requiring members to refrain from conduct interfering with the union's performance of its legal contractual obligations.⁵

The second listed limitation is the one pertinent to our inquiry.

⁵ *Airline Maintenance Lodge 702, I.A.M. & A.W. v. Loudermilk*, 444 F.2d 719, 721 (1971).

Airline Maintenance Lodge 702 v. Loudermilk,⁶ is the case cited by Plaintiff that is the closest to his own situation as far as "reasonable rules" go.

In *Airline Maintenance Lodge 702 v. Loudermilk*, the union had fined Mr. Loudermilk for joining and becoming president of a rival union. The Fifth Circuit said that this was improper though the union could have legally expelled him. Mr. Loudermilk's situation was that he was an employee of an airline which had a union shop agreement with the union that had fined him. The union shop provision of that contract was allowed by § 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh.⁷ The Fifth Circuit's reasoning was that Mr. Loudermilk had been compelled to join Airline Maintenance Lodge 702 which he was trying to replace with another union and that this had free speech overtones so the fine was improper. The difference between the fine imposed and the expulsion that could have been imposed was the last part of § 2 Eleventh which says, in essence, that Mr. Loudermilk could have kept his job with the airline if he had been

⁶ Ibid.

⁷ 2. Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of employment, that within sixty days following the beginning of such employment * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employees to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

expelled for joining another union and becoming its president. So expulsion would have harmed him not, where the fine harmed him economically.

Plaintiff's situation is far different. He does not lay bricks for a living. There is no showing that the Brick Institute of Texas requires him to be a member of any union, let alone Defendant International. No evidence has been presented that Plaintiff's entry into the union was anything other than completely voluntary. Lastly, Plaintiff is a resident of a "Right to Work" state⁸ and not covered by a law such as the Railway Labor Act, 45 U.S.C.A. § 152 Eleventh which allows union shops.

This lack of coercive membership tips the balance in favor of the Defendants. Plaintiff's conduct in teaching the open shop apprenticeship class may have had some free speech elements in it. But there has been no showing that Plaintiff undertook to teach that class for any reason other than to maintain good relations with members of the industry because of his position with the Brick Institute of Texas.⁹

In summation, procedurally, Plaintiff's union trial could have been handled better by Defendant Local 5. Assumably, a new trial could be ordered to clear up any inadequacies in procedure. But in light of the burdens of going forward with evidence and proof that are required and Plaintiff's willing admission to have taught the open shop apprenticeship class as charged, the result would not differ. Therefore, judgment will be entered for the Defendants.

/s/ W. M. TAYLOR, JR.

United States District Judge

DATE: January 28, 1982

⁸ Vernon's Ann. Civ. St. Art. 5207a.

⁹ Apparently, Plaintiff was paid for teaching the class but did not appear to be much of a motivation as Plaintiff was only supposed to teach until another qualified instructor was found.

3. Order on Petition for Panel Rehearing

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5

BRICKLAYERS & ALLIED CRAFTSMEN, ET AL.,

Defendants-Appellees.

**Appeal from the United States District Court for the
Northern District of Texas**

ON PETITION FOR REHEARING

(June 1, 1983)

**Before CLARK, Chief Judge, GOLDBERG and POLITZ,
Circuit Judges.**

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/

CHARLES CLARK

Chief Judge

CERTIFICATE OF SERVICE

This is to certify that on this day of August, 1983, three copies of the foregoing Petition were served upon Appellees by placing same in the United States Mail, postage prepaid, addressed to their respective attorneys of record:

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